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No. 85-1058 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LEONARD L. LISIECKI, PETITIONER

v.

FEDERAL HOME LOAN BANK BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, once a federal agency has sustained its burden of proving "unacceptable performance" on the part of one of its employees within the meaning of Chapter 43 of the Civil Service Reform Act of 1978, the Merit Systems Protection Board is authorized to override the agency's managerial decision that removal, rather than a reduction-in-grade, is the appropriate remedy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. la-22a) is reported at 769 F.2d 1558. The opinion of the Merit Systems Protection Board (Pet. App. 23a-55a) is reported at 23 M.S.P.R. 633.

JURISDICTION

The judgment of the court of appeals (Pet. App. 64a) was entered on August 20, 1985. A petition for rehearing was denied on September 20, 1985 (Pet. App. 65a). The petition for a writ of certiorari was filed on December 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a GS-11 savings and loan examiner employed by the Federal Home Loan Bank Board (FHLBB) in Cleveland, Ohio (Pet. App. 2a). For the period ending

April 13, 1983, his performance was rated unacceptable in "critical element 6" of his position. That element required examiners to develop final examination reports on savings and loan associations under review. *Id.* at 57a. Specifically, petitioner was required to prepare clear, factual, narrative reports of examinations. Although his supervisors regarded this requirement as the single most important element of his position, petitioner consistently failed to perform it at an acceptable level. *Id.* at 57a-59a.

Following his unacceptable performance rating, petitioner was given a corrective action work plan and 180 days within which to improve his performance (Pet. App. 2a). At the end of that period, his performance in "critical element 6" was still unacceptable, and he was removed pursuant to 5 U.S.C. 4303 (Pet. App. 2a). That section of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, authorizes agencies to "reduce in grade or remove an employee for unacceptable performance." The CSRA defines "unacceptable performance" as "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position." 5 U.S.C. 4301(3).

2. Petitioner appealed his removal to the Merit Systems Protection Board, and a hearing was conducted by an MSPB presiding official. See 5 C.F.R. 1201.4(a), 1201.41. The presiding official issued an initial decision on May 29, 1984 (Pet. App. 56a-63a), finding that the agency had established by substantial evidence that petitioner's performance was unacceptable. However, the presiding official also held that he had the authority and responsibility to review the agency's decision that petitioner's unacceptable performance warranted his removal (*id.* at 60a-61a). In reviewing the agency's exercise of managerial discretion, the presiding official applied the standards developed by the Board in *Douglas* v. *Veterans Administration*, 5 M.S.P.R.

280, 313 (1981), to review adverse actions taken under Chapter 75 of Title 5, United States Code (5 U.S.C. 7511 *et seq.*).[1] The presiding official determined that petitioner's removal was unreasonable in the circumstances of this case, invalidated the removal, and substituted the sanction of a demotion to a GS-9 position (Pet. App. 61a).

3. The FHLBB petitioned the full MSPB for review of the initial decision (see 5 C.F.R. 1201.113-1201.116), asserting that the Board lacked authority to mitigate a penalty imposed under Chapter 43 of the CSRA (5 U.S.C. 4301 *et seq.*). The Board, with one member dissenting, agreed with the FHLBB and reversed the presiding official's decision (Pet. App. 23a-55a). The Board held that it lacked the authority to review or modify the sanction selected by an agency in a performance-based action taken under Section 4303. The Board concluded that its authority was limited to determining whether the employing agency had proven by substantial evidence that an employee's performance was unacceptable. With respect to remedy, the Board reasoned that it was solely within the agency's managerial discretion to determine whether an employee's unacceptable performance warranted removal or the lesser sanction of a reduction-in-grade (demotion). Pet. App. 41a.

The Board based its decision on an extensive review of the legislative history of the CSRA, noting that Congress considered the "efficiency of the service" standard and the procedures of Chapter 75, which had provided the only pre-CSRA authority for taking action against poorly performing federal employees, to be wholly inadequate for performance-based personnel actions (Pet. App. 30a-31a, quoting S. Rep. 95-969, 95th Cong., 2d Sess. 40 (1978)):

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[1]Under Chapter 75, an agency may remove, suspend, demote, or furlough an employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7502, 7503, 7512, 7513.

> Congress believed that Chapter 75 procedures were ineffective and made it virtually impossible to remove employees whose performance was unacceptable. * * * Congress concluded that managers' reluctance to take action against employees who were not performing was due to a number of factors, principally "inordinate procedural requirements and unreasonable standards."

Thus, the Board reaffirmed that Chapter 43 " 'originated as a relief measure for agencies and it was enacted for that purpose.' " Pet. App. 30a (quoting *Wells* v. *Harris,* 1 M.S.P.R. 208, 249 (1979)). In light of these legislative goals and Congress's specific refusal to engraft Chapter 75's "efficiency of the service" standard onto Chapter 43 actions,[2] the Board was wary of reinstating "the judicial gloss that had developed around the 'efficiency of the service' requirement for the more than fifty years that agencies had been obligated to observe this requirement in taking adverse actions" (Pet. App. 31a (footnote omitted)). Accordingly, the Board concluded that the rationale relied upon in *Douglas* to support Board review of penalties imposed for misconduct under Chapter 75 did not provide

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[2]As the Senate Report stated (S. Rep. 95-969, *supra,* at 43 (emphasis added)):

> One of the chief differences between the procedures currently applicable at the agency level and the proposed procedures concerns the standard governing the agency's action. Under current law, an employee may be dismissed for unacceptable performance only if dismissal would improve the efficiency of the service. As a practical matter, agencies have found it very difficult to prove this to the degree required by the courts through a series of judicial decisions. Section 4303(a) imposes a new standard. It is "performance which fails to meet established requirements in one or more critical elements of the job." *The committee intends that this new standard should not be governed by the existing case law defining the present standard, "such cause as will promote the efficiency of the service."*

any justification for interfering with an exercise of managerial discretion in choosing between removal and demotion as the remedy for unacceptable performance under Chapter 43 (Pet. App. 40a (citation omitted)):

> [T]he "argument made successfully in *Douglas* that the penalty in an adverse action is inexorably tied to the promotion of the efficiency of the service requirement is totally inapposite in Chapter 43 performance actions where that standard is expressly inapplicable."

4. Petitioner appealed the Board's decision to the Federal Circuit. See 5 U.S.C. 7703. Like the Board, the court of appeals found that Congress enacted Chapter 43 to rectify "the difficult, almost impossible, problem of discharging employees for poor performance" (Pet. App. 5a). The court of appeals concluded that, in drafting Chapter 43, "Congress rejected out of hand the old chapter 75 procedures which had applied both to misconduct and to performance cases" (Pet. App. 10a) and that the "efficiency of the service" standard, which sometimes had been "a refuge for incompetent employees" (*ibid.*), had no place in Chapter 43 proceedings.

In light of the differences between Chapter 43 and Chapter 75, the court of appeals rejected petitioner's argument that it was inconsistent for the Board to review penalties under Chapter 75 but not under Chapter 43. The court found nothing in the CSRA mandating MSPB review of an agency's decision to remove an employee whose performance has been shown by substantial evidence to be unacceptable. It held that the only employee rights applicable in Chapter 43 cases are those set out in 5 U.S.C. 4303(a) (Pet. App. 16a):

> The Reform Act establishes that Congress intended that employees should not have a vested right to a position but rather only those rights expressly stated

by statute and regulation. The right to have MSPB review of the section 4303(a) sanctions for mitigation purposes is not one of those rights.

ARGUMENT

The decision of the court of appeals is correct. It is soundly based upon the text of the CSRA and its legislative history, and it accords appropriate deference to the views of the Board and the Office of Personnel Management, the two agencies charged by Congress with implementing and interpreting the CSRA.[3] Accordingly, review by this Court is not warranted.

1. a. The decision below is consistent with the overall structure and purpose of the CSRA. Prior to the enactment of the CSRA, all actions to remove or discipline government employees—including all performance-based actions—were processed under Chapter 75 (Pet. App. 78a). The CSRA did not alter the basic features of Chapter 75; in particular, the Act preserved the general provision that permits agencies to take action against employees based upon "such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). See generally *Lovshin* v. *Dep't of the Navy*, 767 F.2d 826 (Fed. Cir. 1985) (en banc), petition for cert. pending, No. 85-882 (filed Nov. 18, 1985).

While Chapter 75 was left largely unchanged, Congress, in enacting the CSRA, did make major revisions to Chapter 43, creating a wholly new system for evaluating the performance of federal employees and for taking corrective action in cases of unacceptable performance. Under the new system, an employee's performance is evaluated regularly against objective performance standards, including "critical

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[3]Pursuant to the Board's invitation (see Pet. App. 26a-27a), OPM filed a brief as amicus curiae in which it advocated the same position ultimately adopted by the Board and the court of appeals.

elements," developed for his position. 5 U.S.C. (& Supp. II) 4302, 4302a. By requiring agencies to develop such standards, Congress intended agencies to use Chapter 43 to inform employees of the expected level of performance, recognize and reward employees for superior performance, permit early identification and correction of performance problems, and provide for the reassignment, demotion, or removal of employees who fail to perform at an acceptable level. 5 U.S.C. 4302. Thus, Chapter 43 established a comprehensive framework for monitoring and managing the performance of federal employees, a framework that did not exist prior to the CSRA.

Of particular relevance to this case, Chapter 43 established procedures by which agencies may "reduce in grade or remove an employee for unacceptable performance" (5 U.S.C. 4303(a)). As noted earlier, "unacceptable performance" is defined as "performance of an employee which fails to meet established performance standards in one or more critical elements of such employee's position" (5 U.S.C. 4301(3)). A "critical element" is defined by the Office of Personnel Management as (5 C.F.R. 430.203)

> a component of a job consisting of one or more duties and responsibilities which contributes toward accomplishing organizational goals and objectives and which is of such importance that "Unacceptable" performance on the element would result in "Unacceptable" performance of assigned work.

Congress intended to enable agencies that could demonstrate "unacceptable performance" on the part of an employee to take prompt corrective action; the procedures contained in Chapter 43 were enacted to provide agencies with a streamlined means for demoting or removing poorly performing employees. S. Rep. 95-969, *supra*, at 3, 4, 10, 40. Thus, the agency's burden in a Chapter 43 action is substantially less than its burden in a Chapter 75 action. In a

Chapter 75 case, the agency must establish by a *preponderance* of the evidence that the adverse action will "promote the efficiency of the service." 5 U.S.C. 7513(a), 7701(c)(1)(B). This standard has commonly been interpreted as requiring a showing of a "nexus" between the charges against the employee and some detriment to the efficiency of the service. See, *e.g.*, *White* v. *United States Postal Service*, 768 F.2d 334, 335-336 (Fed. Cir. 1985); *Bonet* v. *United States Postal Service*, 712 F.2d 213, 214 (5th Cir. 1983).

By eliminating the "efficiency of the service" standard for actions brought under Chapter 43 (see note 2, *supra*), Congress necessarily discarded the "nexus" requirement as well. All that is required in a Chapter 43 case is that the agency establish by the lower burden of *substantial* evidence that the employee's performance was unacceptable. 5 U.S.C. 7701(c)(1)(A). In light of Chapter 43's definition of "unacceptable performance," requiring a further showing of the appropriateness of the remedy selected by the agency—removal or demotion—would be redundant. An employee who performs unacceptably is, by definition, one who has failed to perform adequately an important duty or responsibility of his position, thus hindering the accomplishment of the agency's goals and objectives. See 5 U.S.C. 4301(3); 5 C.F.R. 430.203. Clearly, Congress saw no need for an agency to justify ridding itself of such an employee; on the contrary, facilitating the termination of such inept employees was one of Congress's major purposes in enacting the CSRA. See *Debose* v. *Dep't of Agriculture*, 700 F.2d 1262, 1266 (9th Cir. 1983). Contrary to petitioner's submission, therefore, nothing in the language or structure of the CSRA suggests a congressional intent to authorize second-guessing of an agency's decision to remove rather

than demote an employee whose performance is unacceptable.[4]

b. Petitioner nevertheless argues (Pet. 10) that the Board should review Chapter 43 removals to determine whether they are arbitrary. Such action by the Board, of course, would do no less than engraft the old "efficiency of the service" standard onto Chapter 43, a result expressly abjured by Congress. Having already established that an employee was not performing acceptably, the agency would be required to demonstrate that its decision that he be removed, rather than demoted or reassigned, was not an abuse of discretion.

This case well demonstrates the incongruity of requiring such an additional layer of review. After agreeing that the agency had proven by substantial evidence that petitioner's performance was unacceptable, the presiding official nevertheless ordered the agency to reinstate him at the GS-9 level because the official believed that petitioner could adequately perform at that level. As the court of appeals noted, however, most examiners at the Federal Home Loan Bank Board are GS-12s (Pet. App. 16a). Petitioner was but a GS-11 when he was removed in 1984, and he had not been promoted since 1975. The effect of a demotion to the GS-9 level would be to place him back at the *entry-level* for examiners, notwithstanding his career of nearly 12 years with the agency (*ibid.*). In effect, the agency would be

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[4]Furthermore, when Congress intended to restrict an agency's discretion to remove an unacceptably performing employee, it has done so unambiguously. As the court of appeals noted (Pet. App. 13a-14a), the CSRA expressly provides that employees newly promoted to supervisory positions who do not successfully complete a probationary period as supervisors and senior executives who do not demonstrate fully successful executive performance may not be removed; they may only be demoted or reassigned. See 5 U.S.C. 3321(b), 3594, 4303(f); 5 C.F.R. 315.907, 359.701-359.702.

required to continue on its rolls a GS-9 examiner when what the agency obviously intended when it first hired petitioner was that he, like the other career examiners at the FHLBB, would become a journeyman GS-12 examiner. Thus, the fact that petitioner might have performed acceptably at the GS-9 level is irrelevant. Only the agency, not the MSPB or the court of appeals, can possibly know whether it has any use for an examiner who cannot rise above the GS-9 level.

Congress enacted Chapter 43 expressly to prevent such incompetent employees from continuing to be a drain upon the efficiency and effectiveness of the civil service. S. Rep. 95-969, *supra,* at 40. Once the agency has established before the MSPB that the employee's performance has been unacceptable, the role established for the MSPB in a Chapter 43 proceeding has ended; Congress logically gave the agency the discretion to demote or remove the employee as it deems appropriate.[5]

2. The legislative history of the CSRA is replete with expressions of congressional intent to provide federal agencies with a new, more easily administered process for dealing with employees whose performance is unacceptable. Both the court of appeals and the Board reviewed and

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[5]Petitioner nevertheless attempts to find authority for MSPB review of an agency's choice of remedy by relying on isolated individual words in the CSRA. For example, he asserts (Pet. 13 (emphasis in original)) that an employee's right to MSPB review of the agency "action," granted by 5 U.S.C. 4303(e), must mean a right to review of the "*personnel action*" taken by the agency, *i.e.,* removal or demotion. Similarly, petitioner argues that, because 5 U.S.C. 7701(c)(1)(A) authorizes the MSPB to review the "decision" of the agency, the Board must be authorized to review "the decision to impose a certain sanction under § 4303" (Pet. 13). It is axiomatic, however, that statutes must be construed as a whole. See, *e.g., Richards* v. *United States,* 369 U.S. 1, 11 (1962). As demonstrated above, when construed as a whole, the statutory scheme of the CSRA does not permit the MSPB to mitigate the remedy selected by the agency.

analyzed the legislative history exhaustively; both correctly concluded that Congress intended Chapter 43 to be wholly new, self-contained, and free from the encumbrances associated with the old "efficiency of the service" standard. Pet. App. 10a-11a, 31a.

Congress enacted the new Chapter 43 procedures with the stated intent of increasing agencies' flexibility in dealing with employees' poor performance. S. Rep. 95-969, *supra*, at 3, 4. Chapter 43 was intended to eliminate what Congress perceived as an inability or unwillingness on the part of federal managers to take performance-based actions (S. Rep. 95-969, *supra*, at 40):

> Section 203 of the bill also establishes new procedures to govern personnel actions taken against an employee by an agency because of unacceptable performance, and for the appeal of these actions to the Merit Systems Protection Board. The provisions are designed to remedy the widespread criticism of the present system. Inordinate procedural requirements and unreasonable standards have been repeatedly identified as some of the chief reasons why managers currently are reluctant to take action against employees on the grounds of unacceptable performance. Figures supplied the Committee by the Civil Service Commission illustrate the problem. In 1976, the Civil Service Commission remanded 41% of all the cases appealed to it where an agency sought to remove an employee for incompetence.
>
> The prospect of successfully dealing with the appeals process, to ensure that the person is not returned to the rolls, causes managers to go through a long process of preparation that can take months or longer. Often the manager's conclusion is that the task is too formidable and he abandons the effort. At the least, the process is

> excessively delayed, and far more time of the managers must be devoted to the process than is justified.
>
> The bill adopts new procedures to remedy this problem.

See also 124 Cong. Rec. 27535 (1978) (remarks of Sen. Ribicoff); 124 Cong. Rec. 27549, 27550 (1978) (remarks of Sen. Sasser). Thus, Chapter 43 was intended (S. Rep. 95-969, *supra,* at 10)

> [to] simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level within a comprehensive framework for performance evaluation.

Contrary to petitioner's argument (Pet. 14), therefore, Chapter 43 was intended to do far more than substitute a new evidentiary standard (see pages 7-8, *supra*). Although that is one of the "chief differences" (S. Rep. 95-969, *supra,* at 43) between Chapter 43 and Chapter 75, above all Chapter 43 was seen as "streamlin[ing] the appeals process, eliminating unnecessary layers of appeals" (S. Rep. 95-969, *supra,* at 10). As this Court has recognized, one of the major purposes of the Act was to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.' " *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority,* 464 U.S. 89, 92 (1983) (quoting 5 U.S.C. 7101(b)). Accord *Cornelius* v. *Nutt,* No. 83-1673 (June 24, 1985), slip op. 2. Given that goal, there is nothing in the legislative history to suggest that the Board should review and mitigate remedies imposed under Chapter 43. Such additional review would only complicate the "streamlined" approach intended by Congress.

3. Petitioner argues (Pet. 15) that it is anomalous for the Board to mitigate penalties under Chapter 75 but not under Chapter 43. Both the Board and the court of appeals considered and rejected this contention. Pet. App. 14a-16a,

37a-41a. As both noted, the CSRA does not expressly authorize mitigation under either Chapter. In *Douglas* v. *Veterans Administration,* 5 M.S.P.R. 280 (1981), the Board based its determination that it has the authority to mitigate Chapter 75 penalties on three factors: (1) Chapter 75's "efficiency of the service standard"; (2) the practice of its predecessor, the Civil Service Commission, of mitigating penalties under Chapter 75; (3) and the absence of an express prohibition against mitigation. Pet. App. 37a-38a.

As we have demonstrated above, the first of these factors has no application to Chapter 43, because Congress expressly eliminated the "efficiency of the service" standard from that Chapter. Similarly, the practice of the Civil Service Commission under Chapter 75 has no application to determinations under the new Chapter 43, because Chapter 43, as it is now written, did not exist when the Civil Service Commission was adjudicating civil service appeals. Finally, nothing is more clear from the legislative history, as discussed above, than that the old, pre-CSRA rules and procedures have no application whatever to performance-based actions taken under Chapter 43. If the Board is to have authority to mitigate sanctions in Chapter 43 actions, that authority must be affirmatively set forth in the statute or, at a minimum, in unambiguous legislative history. In light of the policy considerations that led to the enactment of Chapter 43, there is no basis for implying administrative and judicial review of remedies merely from the absence of an express prohibition against such review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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